No. 93-1001

JUN 9 1994

IN THE

Supreme Court of the United States

October Term, 1993

[redacted] CLEVELAND CHEMICAL COMPANIES, INC., and [redacted] MINING INTERNATIONAL COMPANY,

Petitioners,

v.

[redacted] WANDA C. DOBSON, [redacted] GWEN and [redacted] GWEN,

Respondents.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, the Southern Poverty Law Center, submits this brief in support of respondents G. Michael Dobson and Wanda C. Dobson.[1]

The Southern Poverty Law Center is a non-profit legal and educational organization dedicated to protecting the rights of poor people and minorities. *Amicus* has an interest in this case because it is committed to ensuring that consumers are not unfairly deprived of a judicial forum in which to resolve their legal claims.

Arbitration clauses are essentially waivers of the traditional right to jury trial. Waivers of such rights should never be lightly presumed, particularly in situations where there is a marked imbalance in knowledge and power. But many consumer situations are characterized by precisely such imbalances. Accordingly, *amicus* urges this Court to clarify that the Federal Arbitration Act ("FAA") does not encompass all contracts within Congress' constitutional authority to regulate and that, in particular, it does not govern arbitration agreements in consumer contracts and other transactions in which reasonable persons in the parties' positions at the time of contracting would not have contemplated substantial interstate activity in carrying out the terms of the contract.

SUMMARY OF ARGUMENT

The salient language of § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, is the phrase "contract evidencing a transaction involving commerce." Petitioners urge that this phrase be read as extending the Act to the full extent of Congress' power under the Commerce Clause, Art. I, § 8, cl. 3. But, unlike statutes in which Congress itself has defined the specific persons and activities that affect commerce, the FAA requires courts to determine in each instance whether a particular contract

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

"evidences a transaction involving commerce." It is therefore implausible to think that Congress meant to include within the scope of the FAA *all* contracts within its constitutional power to regulate — *i.e.*, all contracts. Had Congress meant to do so, it would have specified that the Act applied to "all contracts affecting commerce," or simply "all contracts."

Amicus submits that Congress' intent is best effectuated by an objective version of the "contemplation of the parties" test followed by courts for over thirty years since it was first suggested by Judge Lumbard in *Metro Indus. Painting Corp. v. Terminal Const. Co.*, 287 F.2d 382, 387 (2d Cir.) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817 (1961). At least 16 courts have followed the reasoning of Judge Lumbard's thoughtful concurring opinion. *See* Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 418 & 421 nn. 197-200 (1992) (citing cases). If *stare decisis* is to be recognized in the context of judicial interpretations of statutes, then Congress' failure since 1961 to displace the "contemplation of the parties" test must be accorded weight.

Moreover, in recent times the commerce power has come to be virtually without limit. Thus, Congress can regulate a farmer's production of wheat for home consumption. *Wickard v. Filburn*, 317 U.S. 111, 117-18 (1942). It can criminalize neighborhood loanshark agreements. *Perez v. United States*, 402 U.S. 146 (1971).[2] It can prohibit even local restaurants from engaging in racial discrimination. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

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[2] In *Perez*, this Court explained that, even if there is no "proof that the particular intrastate activity against which a sanction was laid had an effect on commerce," the sanction is nevertheless permissible if the intrastate activity falls within "a class of activities . . . properly regulated by Congress," and that, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." 402 U.S. at 152, 154 (citation omitted).

We have no quarrel with the contemporary expansion of Congress' authority under the Commerce Clause.[3] But precisely because of the extent of that power, petitioners' reading of the Arbitration Act would sweep virtually *all* agreements into the Act. Federal law would suddenly guarantee doctors the statutory right to insert arbitration clauses into forms signed by their patients, requiring them to waive a judicial forum for any malpractice claims. Federal law would similarly guarantee landlords, television repair shops, dry cleaners, and every other local business the right — regardless of their highly attenuated connection to interstate commerce — to insert clauses into their form contracts waiving consumers' rights to a judicial forum. Indeed, in this very case, petitioners insist that a homeowner's contract for termite control services is itself regulable as interstate commerce. If even such local and traditionally intrastate activities are within the Arbitration Act, it is hard to see what is excluded.

Congress never intended the Federal Arbitration Act to be given such an unlimited reading. Indeed, Congress was repeatedly assured by the Act's drafters that it would *not* have such a far-reaching and illogical result.

States have made deliberate decisions to exempt many kinds of consumer transactions from their arbitration statutes. Under petitioners' construction of the Act, these carefully crafted systems for consumer protection would be obliterated in one fell swoop. Given the potential for dramatic intrusion into areas of traditional state concern, petitioners' interpretation of the FAA could not be adopted unless it were supported by a crystal clear statement of congressional intent. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401-03 (1991). If anything, however, it is plain that Congress deliberately *rejected* petitioners' construction of the FAA.

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[3] However, we note that some Justices have expressed concern about the contemporary scope of the Commerce Clause. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310-12 (1981) (Rehnquist, now C.J., concurring in the judgment).

In the end, the arguments of petitioners and their *amici* rest more on current policy trends in favor of arbitration than on the text and history of the statute. But such arguments are a patently insufficient basis for rewriting a 60-year-old statute. Moreover, the recent decisions of this Court favoring arbitration have involved businesses and other sophisticated parties, not ordinary consumers. *E.g.*, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and RICO claims); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933).

For all these reasons, the judgment below should be affirmed.

I. THE FEDERAL ARBITRATION ACT WAS NEVER INTENDED TO GO TO THE LIMITS OF CONGRESS' COMMERCE POWER

The Federal Arbitration Act was never intended to alter the historic power of the States to protect their citizens and consumers against the forced surrender of their traditional rights to trial by jury. The Act was never intended to go to the limits of congressional authority under the Commerce Clause.

(1) The framers of the FAA expected the Act to apply solely to ordinary contract disputes "between merchants." Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926). The Act was drafted by a committee of the American Bar Association, acting upon instructions to consider and report upon "the further extension of the principle of *commercial arbitration*." Report of the Forty-Third Annual Meeting of the A.B.A., 45 A.B.A. Rep. 75 (1920) (emphasis added). The chairman of the ABA committee that drafted the bill testified before the Senate Judiciary Subcommittee that the FAA was "'purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.'" Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 9 (1923), *quoted in Gilmer v. Interstate/*

Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting).[4]

There is no evidence in the lengthy legislative history to the Arbitration Act that Congress contemplated that the Act would apply to consumer contracts. On the contrary, the history reveals that the Act "was written with the implicit assumption that it would be invoked by commercial actors having relatively equal bargaining power." Stempel, *A Better Approach to Arbitrability*, 65 Tul. L. Rev. 1377, 1380 (1991). The organizations that sponsored the FAA were chambers of commerce, shippers, large agricultural producers, and other prominent business groups whose members were engaged in

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[4] *E.g.*, *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearings Before a Subcommittee of the Committee on the Judiciary on S. 4213 and S. 4214*, 67th Cong., 4th Sess. 2 (1923) (statement of Charles L. Bernheimer, chairman of the arbitration committee of the New York Chamber of Commerce) ("[t]he adoption of . . . the Federal statute and the uniform State statute will . . . enable business men to settle their disputes expeditiously and economically"); *id.* at 8 (statement of W.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association) ("there does seem to be quite a demand in commercial centers on the part of a good many commercial organizations . . . to have the privilege of having a vehicle constructed to effectuate an agreement to arbitrate"); *Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) ("The Chairman. What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce. Mr. Bernheimer. Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance."); *id.* at 27 (statement of Alexander Rose, representing the Arbitration Society of America) ("We have a weakness in our system of arbitration. We need, and we must have the cooperation of the Federal courts. We must have the cooperation of the Federal statute, because while the dispute is a domestic one, we can well dispose of it. But when a merchant in New York sells his merchandise to some one in a foreign jurisdiction, his arbitration law is defeated . . . ."); *id.* at 41 ("If business men desire to submit their disputes to speedy and expert decision, why should they not be enabled to do so?") (statement of Julius Cohen).

interstate commerce on a national scale.[5]

(2) The text of the statute refers neither to "all" contracts nor to all contracts "affecting" commerce. Instead, the salient text of the Act limits its scope to "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2. The words of the statute cannot be ignored. The Arbitration Act is quite unlike most laws regulating interstate commerce, which do not require case-by-case analysis as to whether a given activity bears a sufficiently close connection to interstate commerce as to fall within the statute. Most laws simply regulate the chosen activity directly. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Such a "jurisdictional inquiry . . ., turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974); *see also Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1849-51 (1991) (Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., dissenting).[6]

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[5] *Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles L. Bernheimer, chairman of the arbitration committee of the New York Chamber of Commerce) ("The statement I make is backed up by 73 commercial organizations in this country.").

[6] The American Arbitration Association suggests that this Court overlook "the particular words that Congress used" in "any particular statute" in determining the statute's scope. Br. *Amicus Curiae* at 12-13. This novel approach to statutory interpretation is as self-evidently flawed as is the Association's argument that the FAA should be interpreted as if it were the Sherman Act. *Id.* at 13-14. The statutes' texts are completely different, and "[t]he floor debates on the Sherman Act reveal, in Senator Sherman's words, an intent to 'g[o] as far as the Constitution permits Congress to go.'" *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. at 1846 n.7 (quoting 20 Cong. Rec. 1167 (1889)). The legislative history of the FAA points to a contrary conclusion.

The test established by Congress requires courts to judge whether a particular contract evidences a "*transaction involving commerce.*"[7] Because a contract is simply the written memorialization of the intentions of the parties entering the contract, those intentions are of utmost importance in determining whether a contract evidences a transaction involving interstate commerce. The contemplation test should be an objective, not subjective, inquiry that looks to the face of a contract and, if necessary, to the circumstances of the contract's formation and performance for evidence of a transaction involving interstate commerce. The contemplation test, in its objective form, focuses on the expectations of reasonable persons in the parties' positions at the time they entered into the contract. As in any situation in which a court determines the reasonable expectations of the parties, evidence of subjective intent is not irrelevant, but it is likewise not controlling. *See, e.g., C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnerships*, 375 F. Supp. 446, 450 (M.D.N.C. 1974) (the "subjective intent of the parties is not controlling in determining if the agreement objectively evidences a transaction involving commerce, but it is illuminating as to how the parties interpreted their own contract").[8]

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[7] Petitioners argue that § 2 requires only that a contract provide evidence of a transaction, not evidence that the transaction involves interstate commerce. Brief for Petitioners at 15. But the clear meaning of § 2 is that a contract must provide evidence of a transaction that will involve commerce. "[I]nvolving commerce" is an adjectival phrase describing the transaction to be evidenced. The phrase "a transaction involving commerce" carries the same meaning as "a commerce-involving transaction."

[8] The American Bankers Association claims that the contemplation of the parties test is "an anachronism" that is at odds with contemporary business needs. ABA Br. 2. But it is surely illegitimate for this Court to discard longstanding statutory interpretations simply on the allegation that they have become inconvenient. Congress is free to revise the FAA if necessary. In any event, Judge Lumbard's concern was not to restrict unduly the reach of the FAA, but rather to define its reach properly, consistent with the requirements of the statute's text. Judge Lumbard's exposition of the contemplation test was explicitly premised on his appreciation of the "broad remedial purpose" of the FAA. *Metro Indus. Painting Corp.*, 287 F.2d at 387.

The contemplation test as described by the Supreme Court of Alabama asks whether there is objective evidence that the parties contemplated *substantial* interstate activity. This requirement is not designed to apply the FAA stingily only to those transactions involving unusually large levels of interstate activity; rather the use of the word "substantial" suggests that a contract does not "evidenc[e] a transaction involving commerce" when the transaction will relate to interstate commerce in only a tangential, *de minimis* manner. For example, the parties might well assume, in entering a contract, that a local termite service will use vehicles that consume gasoline refined out-of-state, but such an effect on interstate commerce should hardly be considered "substantial." Similarly, as Judge Lumbard explained, "[t]he fact that it is necessary for one party to cross state lines in order to fulfill obligations arising out of the contract should not by itself bring the arbitration clause within the reach of the federal statute. The [FAA] should apply only when the parties know or have reason to believe that the performance of the contract will require *substantial* interstate movement." *Metro Indus. Painting Corp.*, 287 F.2d at 388 (concurring opinion) (emphasis added). Decisions in Alabama make clear that the requirement of "substantiality" is a proper element of the standard.[9]

The contemplation test has been adopted by at least 16 courts.[10] It strikes a reasonable balance: by honoring the

[9] *See, e.g., Ex parte Lorance*, 632 So.2d 475 (Ala. 1994); *Henderson v. Superior Ins. Co.*, 628 So.2d 365, 367-68 (Ala. 1993); *First Real Estate Corp. of Alabama v. Brown Marx Tower Limited Partnership*, 620 So.2d 648, 649 (Ala. 1993).

[10] *E.g., Litton RCS, Inc. v. Pennsylvania Turnpike Comm'n*, 376 F. Supp. 579, 585-87 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1394 (3d Cir. 1975); *Monte v. Southern Delaware County Auth.*, 212 F. Supp. 604, 609-11 (E.D. Pa.), *rev'd*, 321 F.2d 870 (3d Cir. 1963); *Varley v. Tarrytown Assoc., Inc.*, 477 F.2d 208, 209 (2d Cir. 1973); *Singer Co. v. Tappan Co.*, 403 F. Supp. 322, 323 n.1 (D.N.J. 1975), *aff'd*, 544 F.2d 513 (3d Cir. 1976); *O'Meara v. Texas Gas Transmission Corp.*, 230 F. Supp. 788, 790-91 (N.D. Ill. 1964); *Ex parte Clements*, 587 So. 2d 317, 319 (Ala. 1991); *Ex parte Warren*, 548 So. 2d 157, 159-60 (Ala.), *cert. denied*, 493 U.S. 998 (1989); *Action CATV, Inc. v.*

reasonable expectations of the parties, it ensures the enforceability of arbitration agreements involving national businesses obviously engaged in interstate commerce, while preserving an enclave for consumer contracts and local transactions that should not be subject to the FAA.

By contrast, petitioners' test reduces predictability and encourages forum shopping. If the FAA were interpreted to cover any contract whose performance turns out to affect interstate commerce, then the parties will not necessarily know in advance whether the FAA will apply to their transaction. If two persons enter a contract that includes an arbitration agreement but contains no indication whatsoever that the contract involves interstate commerce, either party, under petitioners' theory, could bring the contract under the coverage of the FAA by choosing to perform in a manner that involves interstate commerce — even if the connection to interstate commerce is wholly gratuitous and unexpected. This would enable one party to frustrate the intentions of the other, who may have been unwilling to enter an agreement that would be covered by the procedures of the FAA. Such a result would be inimical to Congress' aim of respecting the parties' reasonable expectations. *See Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to

Wildwood Partners, Ltd., 508 So. 2d 1274, 1276 (Fla. Dist. Ct. App. 1987); *Riverfront Properties Ltd. v. Max Factor III*, 460 So. 2d 948, 953 (Fla. Dist. Ct. App. 1984); *University Casework Sys., Inc. v. Bahre*, 362 N.E.2d 155, 162 (Ind. Ct. App. 1977); *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 326 N.E.2d 844, 852 (Ind. Ct. App. 1975); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127, 130 (Kan. Ct. App. 1982); *Paramore v. Inter-Regional Fin. Group Leasing Co.*, 316 S.E.2d 90, 92 (N.C. App. 1984); *Cohoon v. Ziman*, 298 S.E.2d 729, 730-31 (N.C. App. 1983); *Burke County Pub. Schs. Bd. of Educ. v. Shaver Partnership*, 279 S.E.2d 816, 822 (N.C. App. 1981); *Deep South Oil Co. v. Texas Gas Corp.*, 328 S.W.2d 897, 905-06 (Tex. Civ. App. 1959).

arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

(3) This Court's prior decisions support the contemplation test and are inconsistent with petitioners' reading of the Act. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), this Court indicated that the "involving commerce" language in the FAA applies to those who are employed in commerce, rather than consumers or ordinary employees. This Court stated that the contract at issue (a plant superintendent's employment contract signed in New York and performed in Vermont) did not

> evidence "a transaction involving commerce" within the meaning of § 2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.

Id. at 200-01. Quite plainly, however, the employment contract would have been within Congress' constitutional authority to regulate. Thus, *Bernhardt* is simply irreconciliable with petitioners' proffered interpretation of the Act, as the American Arbitration Association candidly admits. *See* Br. *Amicus Curiae* at 7-8 n.1.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that the Act covered a consulting agreement that "was inextricably tied to [the] interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business." *Id.* at 401. But this Court was quite careful *not* to expand the FAA to the outer limits of Congress' commerce power. Indeed, it rested its view of the Act on legislative history explaining that the FAA "'reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.'" *Id.* at 401-02 n.7 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)).

That the FAA extends to an arbitration clause included by two national or regional businesses in a contract that is ancillary to interstate shipments of goods, as in *Prima Paint*, hardly shows that the Act should apply to ordinary consumer contracts involving purely local matters.[11]

Petitioners rely on the statement in *Perry v. Thomas*, 482 U.S. 483 (1987), that the FAA "embodies Congress' intent to provide for the full enforcement of arbitration agreements within the full reach of the Commerce Clause." *Id.* at 490. But this comment was sheer dictum, since the contract at issue there — a broker's employment agreement with Kidder, Peabody — plainly implicated interstate commerce. *See United States Nat'l Bank v. Independent Ins. Agents of Am.*, 113 S. Ct. 2173, 2187 n. 11 (1993) (providing a "valuable reminder about the need to distinguish an opinion's holding from its dicta"). Moreover, since *Perry* this Court has recognized that "[t]he FAA contains no express pre-emptive provision, *nor does it reflect a congressional intent to occupy the entire field of arbitration.*" *Volt Information Sciences*, 489 U.S. at 477 (emphasis added). Of course, if the FAA went to the limits of the Commerce Clause, it would essentially pre-empt the field.

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[11] The majority in *Prima Paint* rejected Justice Black's historical argument, raised in dissent, that the FAA should "apply only to 'contracts between merchants for the interstate shipment of goods.'" *Prima Paint*, 388 U.S. at 401 n.7. The contract in *Prima Paint* was an agreement between a paint manufacturing corporation and another corporation concerning "the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State." *Id.* at 402 n.7. This contract between corporations concerning the movement of an entire business would clearly fall within any understanding of "interstate commerce." Nevertheless, Justice Black's conclusions about the legislative history of the FAA are correct.

II. PETITIONERS' READING OF THE ACT WOULD DEVASTATE CONSUMER INTERESTS

In circumstances involving fully informed parties with equal bargaining power, arbitration may well provide an appropriate method of dispute resolution. But most consumer claims do not arise in such situations. An arbitration clause inserted by the superior party into a form contract, or other in circumstances in which there is a marked imbalance of sophistication, knowledge, and financial resources, functions essentially as an uninformed waiver of the right to trial by jury. Yet the jury is "the single most important institution in the history of Anglo-American law." Judge Morris Arnold, *The Civil Jury in Historical Perspective*, in The American Civil Jury 9-10 (1987).[12]

Waivers of such deep-seated and traditional rights are not lightly inferred, and this Court has made clear that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292, 307 (1937). Courts therefore must "indulge every reasonable presumption against waiver" of a due process right, *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972), and such waivers must be knowing and voluntary. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972).

This Court should therefore clarify that the FAA does not encompass consumer contracts. Indeed, this Court has already noted that "categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded [under 9 U.S.C. § 1] from the reach of the Act." *Prima Paint Corp.*, 388 U.S. at 402 n.9 (referring to employment contracts).

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[12] *See also Dimick v. Schimdt*, 293 U.S. 474, 485-86 (1934); *Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979) (Rehnquist, now C.J., dissenting); Justice Clark, *The American Jury: A Justification*, 1 Valparaiso L. Rev. 1, 1-7 (1966); Judge Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 Tex. L. Rev. 47, 48-52 (1977).

The resolution of claims by arbitrators rather than the courts radically affects a cause of action. As this Court has recognized, arbitration removes numerous procedural guarantees available to litigants in a court of law as a trade-off for parties seeking an informal resolution of private disputes. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). That is why a pre-dispute arbitration agreement between parties of unequal bargaining power has generally been held unenforceable under federal law wherever important rights are involved.[13] Accordingly, arbitration clauses should not be enforced where the potential for misapprehension and unfairness is unacceptably high.[14]

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[13] *See, e.g., U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 356 (1971) (seaman's wage claim under 46 U.S.C. § 596 *et seq.* not subject to compulsory arbitration); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742-45 (1981) (claim for minimum wages under FLSA nonarbitrable); *Curran v. Merrill Lynch, Pierce, Fenner & Smith*, 622 F.2d 216 (6th Cir. 1980) (claims brought under Commodity Exchange Act nonarbitrable except in certain limited circumstances), *aff'd*, 456 U.S. 353 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-59 (1974) (statutory right to trial de novo under Title VII cannot be foreclosed by prior submission of discrimination claim to final arbitration).

[14] For example, in *Bell v. Congress Mortgage Co.*, No. A061946 (Calif. Ct. App. 1st Dist. May 17, 1994), a state appellate court recently refused to enforce an arbitration clause in a mortgage refinancing agreement, explaining that the provision did not "fall within the reasonable expectation of the borrowers." *Id.* The court explained that "the borrowers are generally elderly, unsophisticated and financially distressed individuals who relied upon the good graces of skilled salespersons from a substantial corporate lender." *Id.* "In essence, the adherent surrenders his constitutional right in a trial by jury, as well as virtually all the protections commonly associated with judicial review. . . . [W]e are unwilling to permit the parties to relinquish so casually these fundamental rights." *Id.*; *see also Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 152, 840 P.2d 1013 (Ariz. 1992) (refusing to enforce agreement to arbitrate medical malpractice claims, observing that "there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived").

The Arbitration Act says nothing to direct a court's inquiry concerning the quality of either party's assent to the arbitration clause other than requiring a written arbitration agreement and referring to grounds for revocation available at common law. But a waiver of the traditional right to jury trial is simply not on a par with other provisions of the "fine print" containing the boilerplate provisions of a contract. Thus, many States have imposed special requirements on the formation of arbitration agreements, in order "to guard against 'surprise' and to insure that consent to arbitration has been knowing and informed." Murray, Processes of Dispute Resolution: The Role of Lawyers 453 (1989). These include requirements that arbitration clauses contain certain language, that they appear in a particular size of type, and that they be separately initialed. *See* Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 Hofstra L. Rev. 385, 403 (1992) (listing States). Yet the lower courts have typically ruled, in situations where the FAA governs, that States may not protect consumers in this manner, on the supposed ground that such requirements "discriminate" against arbitration clauses.[15]

Moreover, States have recognized that consumers should be allowed to seek rescission *in court* of contracts that are void for fraud, duress, illegality, or misrepresentation.[16] But, if the FAA were to apply to consumer transactions, those claims could be raised only in arbitration. *Prima Paint*, 388 U.S. at 402-04.

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[15] *See, e.g., Threlkeld & Co. v. Metallgesellshaft, Ltd.*, 923 F.2d 245, 250 (2d Cir.), *cert. dismissed*, 112 S. Ct. 17 (1991); *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806 (8th Cir. 1986). *See also* Br. of American Bankers Ass'n 8-9 & 13 n.2.

[16] *See, e.g., George Engine Co. v. Southern Shipbuilding Corp.*, 350 So.2d 881, 884-86 (La. 1977); *Thayer v. American Fin. Advisors, Inc.*, 322 N.W.2d 599, 602-03 (Minn. 1982); *Fouquette v. First Am. Nat'l Sec., Inc.*, 464 N.W.2d 760, 762-63 (Minn. Ct. App. 1991); *Paramore v. Inter-Regional Fin. Group Leasing Co.*, 316 S.E.2d 90, 92 (1984); Annot., *Claim of Fraud in the Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 11 A.L.R.4th 774 (1982 & 1994 supp.).

Thus, only by declining petitioners' invitation to broaden the scope of the "involving commerce" language can this Court enable States to continue to protect consumers through these important means.

Indeed, to extend the scope of the FAA as petitioners seek would ride roughshod over carefully constructed state policies designed to facilitate arbitration while balancing consumer interests. Many States have adopted special protections in their arbitration statutes to exempt consumer claims altogether.[17] If the pre-emptive effect of the FAA were extended to the limit of Congress' commerce power, these exemptions would be of no practical effect. Surely, Congress did not intend such a far-reaching result.

Given the potential for intrusion into matters of traditional state concern, petitioners' construction of the FAA could not be adopted without a plain statement of congressional intent. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401-03 (1991). This test cannot possibly be met here.

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[17] *See, e.g.*, Ark. Code Ann. § 16-108-201 (excluding "personal injury or tort matters, employer-employee disputes," and claims by "any insured or beneficiary under any insurance policy or annuity contract"); Ga. Code Ann. § 9-9-2(c)(3), (5), (6), (7) & (10) (excluding contracts of insurance, loan agreements and consumer financing agreements involving $25,000.00 or less, contracts for the purchase of consumer goods, contracting involving consumer transactions, and agreements to arbitrate future tort claims arising out of personal injury or wrongful death); Ind. Code Ann. § 34-4-2-1(b) (excluding "all consumer leases, sales, and loan contracts, as . . . defined in the Uniform Consumer Credit Act"); Iowa Code Ann. § 679A1(2)(a) & (b) (excluding contracts of adhesion, contracts between employers and employees, and some tort claims); Kan. Stat. Ann. § 5-401 (excluding contracts of insurance, contracts between employers and employees, and contracts providing for arbitration of tort claims); Mont. Code Ann. § 27-5-114 (excluding, *inter alia*, contracts by individuals for the acquisition of property, services, or credit where the total consideration furnished by the individual is $5,000 or less); S.C. Code Ann. § 15-48-10 (excluding certain claims arising from lawyer-client and doctor-patient relationships, personal injury claims, and claims under any insurance policy or annuity contract).

CONCLUSION

For all these reasons, petitioners' attempt to expand the scope of the Federal Arbitration Act should be rejected. The judgment below should be affirmed.

Respectfully submitted,

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